CLERK'S COPY.

13499

CERTIFICATE.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 96.

WILLIAM F. BOISSEORIE, HENRY McMORRAN, AND T. E. WRIGHT, APPELLANTS,

vs.

PATRICK SHEA.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

FILED MAY 16, 1900.

(18,161.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 98.

WILLIAM F. BOTSFORD, HENRY McMORRAN, AND T. R. WRIGHT, APPELLANTS,

vs.

PATRICK SHEA.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

INDEX.

	Original.	Print.
Certificate of United States circuit court of appeals for the seventh circuit	1	1
Statement of case	1	1
Questions certified	2	2
Judge's certificate	3	2
Clerk's certificate	4	2

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 23, 1902.

1 In the United States Circuit Court of Appeals for the Seventh Circuit.

WILLIAM F. BOTSFORD, HENRY MCMORRAN, and T. R. Wright, Appellants, vs. PATRICK SHEA.	No. 529. In Admiralty.

In this case, duly argued and submitted to this court, there arise questions of law concerning which this court desires the instruction and advice of the Supreme Court of the United States.

The appellee, Patrick Shea, exhibited his libel in the district court of the United States for the eastern district of Wisconsin, against the steam propeller Osceola, her tackle, apparel and furniture, to recover damages for personal injuries sustained under the circumstances herein stated.

At the hearing below, the district court pronounced for the libellant awarding him damages for the injury sustained, and from the decree of that court in that behalf, the respondents below, the owners of the vessel, have appealed to this court.

The owners had supplied the vessel with a movable derrick for the purpose of raising the gangways of the vessel when in port, in order to discharge cargo. The appliance was in every respect fit and suitable for the purpose for which it was intended and furnished to be used, and at the time of the injury was in good repair

2 and condition. The gangways which were to be raised by the derrick were each about ten feet long lengthwise of the ship, about seven feet high and weighed 1050 pounds. In the month of December, 1896, the vessel was on a voyage bound for the port of Milwaukee, and when within three miles of that port, and while in the open lake, the master of the vessel ordered the forward port gangway to be hoisted by means of the derrick, in order that the vessel might be ready to discharge cargo immediately upon arrival at her dock. At this time the vessel was proceeding at the rate of eleven miles an hour against a head of wind of eight miles an hour. Under the supervision of the mate, the crew, including the appellee Patrick Shea, who was one of the crew, proceeded to execute the order of the master. The derrick was set in place to raise the gangway. As soon as the gangway was swung clear of the vessel, the front end was caught by the wind and turned outward broadside to the wind and by the force of the wind was pushed aft and pulled the derrick over, which in falling struck and injured the libellant. The negligence, if any there was, consisted solely in the order of the master that the derrick should be used and that the gangway should be hoisted while the vessel was yet in the open sea when the operation might be impeded and interfered with by the wind. The mate and the crew in executing the orders of the mas-

ter of the vessel, acted in all respects properly, and were guilty of no negligence in the performance of the work. The libel charged negligence upon the owners of the vessel in "requiring and permitting the work of unshipping said gangway to be done while said vessel was at sea and running against the wind." The owners were not present upon the vessel, nor was the master a part owner of the vessel. It is contended that the vessel and its owners are liable for every improvident or negligent order of the captain in the course of the navigation or management of the vessel.

The questions of law upon which this court desires the advice and instruction of the Supreme Court, are—

First. Whether the vessel is responsible for injuries happening to one of the crew by reason of an improvident and negligent order of the master in respect of the navigation and management of the vessel.

Second. Whether in the navigation and management of a vessel, the master of the vessel and the crew are fellow-servants.

Third. Whether as a matter of law the vessel or its owners are liable to the appellee, Patrick Shea, who was one of the crew of the vessel, for the injury sustained by him by reason of the improvident and negligent order of the master of the vessel in ordering and directing the hoisting of the gangway at the time and under
3 the circumstances declared; that is to say, on the assumption that the order so made was improvident and negligent.

These questions the court on this day orders certified and submitted to the Supreme Court of the United States for its proper decision.

WILLIAM A. WOODS.
JAMES G. JENKINS.

November 8, 1899.

4 United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, clerk of the United States circuit court of appeals for the seventh circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 3, inclusive, contain a true copy of the order of the United States circuit court of appeals for the seventh circuit, entered November eighth, 1899, certifying to the Supreme Court of the United States questions of law concerning which it desires the instructions of that court for its proper decision, in the case of William F. Botsford, Henry McMorran and T. R. Wright *vs.* Patrick Shea, No. 529, October term, 1898, as the same remains *remains* upon the files and records of the United States circuit court of appeals, for the seventh circuit.

Seal United States Circuit Court of Appeals, Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the seventh circuit, at the city of Chicago, this thirteenth day of November, A. D. 1899.

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

Endorsed on cover: File No. 18,161. U. S. C. C. of appeals 7th circuit. Term No. 98. William F. Botsford, Henry McMorran and T. R. Wright, appellants, *vs.* Patrick Shea. (Certificate.) Filed May 13, 1901.

No. 98.
Brf. of Van Alstyne for Appts.

Supreme Court U.S.
FILED
NOV 13 1902
JAMES H. McKENNEY,
Clerk.

Filed Nov. 13, 1902.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 98.

WILLIAM F. BOTSFORD, HENRY McMORRAN AND T. R. WRIGHT,

Appellants,

vs.

PATRICK SHEA.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Brief of Appellants.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 98.

WILLIAM F. BOTSFORD, HENRY McMORRAN AND T. R. WRIGHT,

Appellants,

vs.

PATRICK SHEA.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Brief of Appellants.

The certificate sets out the facts and the questions certified as follows:

"The appellee, Patrick Shea, exhibited his libel in the District Court of the United States for the Eastern District of Wisconsin, against the steam propeller Osceola, her tackle, apparel and furniture, to recover damages for personal injuries sustained under the circumstances herein stated.

At the hearing below, the District Court pronounced for the libellant awarding him damages for the injury sustained, and from the decree of that court in that behalf, the respondents below, the owners of the vessel, have appealed to this court.

The owners had supplied the vessel with a movable derrick for the purpose of raising the gangways of the vessel when in port, in order to discharge cargo. The appliance was in every respect fit and suitable for the purpose for which it was intended and furnished to be used, and at the time of the injury was in good repair and condition. The gangways which were to be raised by the derrick were each about ten feet long lengthwise of the ship, about seven feet high and weighed 1050 pounds. In the month of December, 1896, the vessel was on a voyage bound for the port of Milwaukee, and when within three miles of that port, and while in the open lake, the master of the vessel ordered the forward port gangway to be hoisted by means of the derrick, in order that the vessel might be ready to discharge cargo immediately upon arrival at her dock. At this time the vessel was proceeding at the rate of eleven miles an hour against a head of wind of eight miles an hour. Under the supervision of the mate, the crew, including the appellee, Patrick Shea, who was one of the crew, proceeded to execute the order of the master. The derrick was set in place to raise the gangway. As soon as the gangway was swung clear of the vessel, the front end was caught by the wind and turned outward broadside to the wind and by the force of the wind was pushed aft and pulled the derrick over, which in falling struck and injured the libellant. The negligence, if any there was, consisted solely in the order of the master that the derrick should be used and that the gangway should be hoisted while the vessel was yet in the open sea when the operation might be impeded and interfered with by the wind. The mate and the crew in executing the orders of the master of the vessel, acted in all respects properly, and were guilty of no negligence in the performance of the work. The libel charged negligence upon the owners of the vessel in 'requiring and permitting the work of unshipping said gangway to be done while said vessel was at sea and running against the wind.' The owners were not present upon the vessel, nor was the master a part owner of the vessel. It is contended that the vessel and its owners are liable for every improvident or negligent order of the captain in the course of the navigation or management of the vessel."

The questions of law upon which this court desires the advice and instruction of the Supreme Court, are—

First. Whether the vessel is responsible for injuries happening to one of the crew by reason of an improvident and negligent order of the master in respect of the navigation and management of the vessel.

Second. Whether in the navigation and management of a vessel, the master of the vessel and the crew are fellow servants.

Third. Whether, as a matter of law, the vessel or its owners are liable to the appellee, Patrick Shea, who was one of the crew of the vessel, for the injury sustained by him by reason of the improvident and negligent order of the master of the vessel in ordering and directing the hoisting of the gangway at the time and under the circumstances declared; that is to say, on the assumption that the order so made was improvident and negligent.

ARGUMENT.

The first question certified is as follows:

Is the vessel responsible for injuries happening to one of the crew by reason of an improvident and negligent order of the master in respect of the navigation and management of the vessel?

A proceeding *in rem* in the admiralty, is a proceeding to give effect to a maritime lien and such a lien must always exist to form the basis of such a proceeding.

Beane vs. The Mayurka, 2 Curt., 72.
The Rock Island Bridge, 6 Wall., 213, 215.
The Corsair, 145 U. S., 335, 347.

"The maritime privilege or lien is adopted from the civil law, and imports a tacit hypothecation of the subject of it. It is a *jus in re*, without actual possession or right of possession. It accompanies the property in the hands of a *bona fide* purchaser. It can be executed and divested only by a proceeding *in rem*. This sort of proceeding against personal property is unknown to the common law, and is peculiar to the process of the courts of admiralty."

The Yankee Blade, 19 How., 82, 89,
The Glide, 167 U. S., 606, 612.

The maritime lien then is but an incident, a security and does not exist in favor of one to whom the owner of the vessel is not

liable *in personam* founded upon some maritime contract or tort connected with the vessel.

It necessarily follows that the vessel is not responsible unless appellants are liable *in personam* to appellee under some law, maritime or state, for the damages caused by the negligent order of the master, and such law gave him a lien upon the vessel as security for the payment of his damages.

It is therefore evident that all the questions certified may properly be argued together, for if, by the law governing the case, whether it be maritime or state, the owner of a vessel is not liable to one servant for injuries caused by the negligence of a fellow servant, and if the master of a vessel in respect to acts done in the navigation and management of the vessel is a fellow servant of the seamen, the first question must be answered in the negative; the second in the affirmative and the third in the negative.

In *The Lottawanna*, 21 Wall., 558, Mr. Justice BRADLEY in judicially pronouncing the maritime law of this country observed:

"The maritime law is only so far operative as law in any country as it is adopted by the laws and usages of that country. * * * * The question as to the true limits of maritime law and admiralty jurisdiction is undoubtedly, as Chief Justice Taney intimates, exclusively a judicial question, and no state law or Act of Congress can make it broader (or it may be added), narrower, than the judicial power may determine those limits to be. *But what the law is within those limits, assuming the general maritime law to be the basis of the system, depends upon what has been received as law in the maritime usages of this country, and on such legislation as may have been competent to affect it.* To ascertain, therefore, what the maritime law of this country is, it is not enough to read the French, German, Italian, and other foreign works on the subject, or the codes which they have framed; but we must have regard to our own legal history, constitution, legislation, usages, and adjudications as well. The decisions of this court illustrative of these sources, and giving construction to the laws and Constitution are especially to be considered; and when these fail us, we must resort to the principles by which they have been governed." Pp. 572, 576.

What then has been received in the maritime usages of this country as the law of the liability of vessel owners to seamen injured in the service of the vessel?

The laws of Oleron relating to seamen, Art. 6, are as follows:

"If any of the mariners hired by the master of any vessel, go out of the ship without his leave, and get themselves drunk, and thereby there happens contempt to their master, debates, or fighting and quarreling among themselves, whereby some happen to be wounded: in this case the master shall not be obliged to get them cured, or in anything to provide for them, but may turn them and

their accomplices out of the ship; and if they make words of it, they are bound to pay the master besides; but if by the master's orders and commands any of the ship's company be in the service of the ship and thereby happen to be wounded or otherwise hurt, in that case they shall be cured and provided for at the cost and charges of the ship."

Appendix, to 30 Fed. Cas., p. 1174.

The Laws of Wisbury, Art. 18, are as follows:

"A mariner being ashore in the master's or the ship's service, if he should happen to be wounded, he shall be maintained and cured at the charge of the ship, but if he goes ashore on his own head, to be merry, and divert himself, or otherwise, and happens to be wounded, the master may turn him off, and the mariner shall be obliged to refund what he has received, and besides to pay what the master shall be forced to pay over and above to another whom he shall hire in his place."

Appendix, to 30 Fed. Cas., p. 1191.

The laws of Hanse Towns, are as follows:

"Art. 39, if any seaman is wounded in the ship's service, he shall be cured at the charge of the ship, but not if he is wounded otherwise."

Appendix, to 30 Fed. Cas., p. 1200.

The Marine Ordinances of Louis XIV., Sections 11 and 12, Title Fourth, provided as follows:

"If a seaman be wounded in the service of a ship, or fall sick during a voyage, he shall be paid his wages, and treated at the charge of the ship, and if he be wounded in fighting against enemies or pirates, he shall be cured at the charge of the ship and cargo. But if being on shore without leave he be wounded, he shall not be dressed at the charge of the ship, nor of the loading; and he may be dismissed, without pretending to any more than the wages that are due to him."

Appendix, 30 Fed. Cas., p. 1209.

It is no doubt true that the substance of these laws to the effect that if a seaman be wounded in the service of the ship or fall sick during the voyage, he shall be paid his wages and cured at the charge of the ship has been adopted in this country.

The Alexandria, 17 Fed. Rep., 390.

These laws, it is clear, are insufficient to give appellee a lien upon the vessel for damages based on mental and physical pain and loss of earning capacity.

After diligent search the writer has been unable to find anything

tending to show that there is any *general* maritime law giving a seaman injured in the service of the ship by the negligence of the master or other officers a cause of action against the owner and a lien upon the ship for damages based on physical and mental pain and loss of earning capacity. The general maritime law is silent upon the subject of such damages, in consequence of which it is certain that this country has not adopted anything on that subject from the general maritime law.

Nor has the writer been able to find any Act of Congress or reported case tending to show that there is any maritime law of this country giving a seaman injured in the service of the ship by the negligence of the master or other officer, a cause of action against the owner, and a lien upon the ship for damages based on physical and mental pain and loss of earning capacity. In short, the maritime law of this country is, for some reason, silent upon the subject under consideration.

What law, then, governs this case?

"We must always remember that the court cannot make the law, it can only declare it. If, within its proper scope, any change is desired in its rules, other than those of procedure, it must be made by the legislative department."

The Lottawanna, 21 Wall., 576, 577.

It was also held in *The Lottawanna* that the court could not in any event create a lien, "since a lien is a right of property and not a mere matter of procedure." P. 579.

As the maritime law of this country is silent in respect to the claim made in the libel, and as the case must be decided according to law, it is evident that the court must—if it has the right so to do—apply the municipal law, for as we have already seen it cannot extend the maritime law beyond its established limits. It is, however, submitted that as the appellee resorted to a libel *in rem*, the court is bound by the maritime law.

Homer Ramsdell Trans. Co. vs. La Compagnie Gen. Trans., 182 U. S., 406.

It is further submitted that by the maritime law of this country the liability of the vessel owner, in cases like the present, is limited to medical and surgical attendance, and wages to the end of the voyage.

In the *City of Alexandria, Supra*, the cook fell through the hatch, which had been negligently left open. He was cared for at the expense of the ship and was paid his wages to the end of the voyage.

Afterwards he resorted to a libel *in rem* to recover additional compensation, and it was held that by the maritime law his right to compensation was limited to that which he had received. In passing upon the question the court observed:

"When the owners perform all that can be reasonably done on their part by the proper equipment of the vessel for the voyage, and the selection of competent officers and a sufficient crew, no reason exists in natural justice for holding them or their vessel answerable for accidents to seamen which happen during the voyage beyond the limits which the maritime law has established."

In *The City of Norwalk*, 55 Fed. Rep., 107, the court observed:

"It must be borne in mind that the maritime law is not in itself a complete and perfect system. In all maritime courts there is a considerable body of municipal law that underlies the maritime as the basis of its administration. *Strictly speaking, the maritime law is that alone which is peculiar to, or which specially concerns maritime transactions.*"

The transaction in question was certainly a maritime transaction and it would seem that the case should be decided under maritime law unless some state law that may be enforced by the court affects the case.

There are, however, some reported cases in admiralty, which will be referred to presently, holding that a seaman injured in the service of the ship by the negligence of the master, has a cause of action to recover damages from the owner for such personal injury, but there is, it is believed, no reported case holding that he has a lien upon the vessel, and the cases holding the owner liable *in personam* are rested on the common law, as that law was understood by the courts deciding them.

Prior to the decision of *Ross vs. Railway Company*, 112 U. S., 377, decided December 8, 1884, and overruled in *Railway Company vs. Conroy*, 175 U. S., 323, there is, it is believed, no reported case in the Federal Courts of a suit by a seaman against a vessel, or its owners to recover damages for a personal injury caused by the negligence of the master in the navigation or management of the vessel, excepting *Daub vs. Railway Company*, 18 Fed. Rep., 625, decided in 1883, in which the court in charging the jury, ruled that neither the master nor the mate of a vessel (the defendant was a carrier by water) were fellow servants of a seaman. The right to recover, however, was based upon the negligence of the master, the incompetency of the mate and negligence of the owner in employing the mate. If the owner negligently employed an incompetent mate and the incompetency of the mate contributed to the injury, the owner was of course liable under the rules of the common law, which appears by the report of the case, to have been the law applied to the facts.

In *The Titan* and *The Hills*, 23 Fed. Rep., 313, decided in 1885, it was held that a deck hand and the pilot were not fellow servants.

In *The A. Heaton*, 43 Fed. Rep., 592, it was held that a seaman and the master are not fellow servants.

In *The Sachen*, 42 Fed. Rep., 66, decided in 1890, it was decided that common seamen are fellow servants.

In *McCullough's Adm. vs. N. Y., etc., Steamboat Co.*, 20 U. S. App., 570, the owner of a vessel was held liable to the engineer for personal injuries caused in part by the negligence of the master.

These suits were all *in personam* in admiralty, but the rules of the common law were followed, and the decisions were rested entirely upon the *Ross* case.

In *Quin vs. Lighterage Co.*, 23 Fed. Rep., 363, the master and a common seaman were held to be fellow servants upon the ground that the negligent act of the master which caused the injury was one that any co-servant in the same employment might have performed.

In *Olsen vs. Navigation Co.*, 44 C. C. A., 51, brought by a libel *in personam*, the ship carpenter and the master were held to be fellow servants, and the decision was rested upon the recent case of *Railway Company vs. Conroy*, 175 U. S., 323.

These cases were therefore decided according to the common law.

In *Quebec Steamship Co. vs. Merchant*, 133 U. S., 375, it was held that the porter, the carpenter and the stewardess of a steam vessel were fellow servants, and that the owners of the vessel were not liable to the stewardess for damages caused by the negligence of the porter and the carpenter.

This case was brought in a state court and removed into a circuit court of the United States, and the court, no doubt, had the right to decide the case upon the land laws, instead of upon the sea laws.

> *Homer Ramsdell Co. vs. LaCompagnie Gen. Trans., supra.*

If, however, the second question certified is to be decided under the common law, then it is certain that the master of the vessel and appellee were fellow servants, and that the owners of the vessel are not liable for the damages sustained.

> *Railway Co. vs. Conroy*, 175 U. S., 323.

There are cases in other jurisdictions in which facts similar to those in the case at bar have been passed upon.

In *Gabrielson vs. Waydell*, 135 N. Y., 1, the owners of a vessel were sued for damages caused by the willful and malicious act of their captain in assaulting and injuring a seaman while upon the

high seas, and the court held that considering that the case should be determined upon the principles of the maritime law, it could not say that those principles establish any rule differing from the common law rule. The Judge writing the opinion, observed:

"I am not satisfied that there is any principle of the law which intends, or that any consideration of public policy demands, that the owners shall come under any obligation to indemnify a member of the ship's company against such negligence or tortious acts of the captain."

In *Hedley vs. Pinkey & Sons Steamship Co.*, 1 L. R. Q. B. (1892), 58, the owners of a vessel were sued for damages caused by the death of one of the crew. The gangways of the vessel reached to the deck, which necessitated the use of a portable railing above the gangway; this portable railing was removed for the purpose of taking out the gangway and the captain allowed the vessel to go to sea without causing the railing to be replaced; while at sea a storm arose and a seaman was washed overboard by reason of the failure of the captain to cause the rail to be replaced. *Held*, that the captain and the seaman lost were fellow servants engaged in a common employment, and that for the damage resulting the owners were not liable.

In *Kalleck vs. Deering*, 161 Mass., 469, it was held, that the owners of a coasting vessel are not liable for injuries occasioned to a seaman on board the vessel while in port, and in command of the mate, by the breaking of a triangle on which the seaman was sitting and scraping the mast, where they have furnished proper materials for the construction of the triangle, and the injury is caused by the negligence of the mate in constructing it and in ordering the seaman to use it.

Now as sated *supra*, it is submitted that as the suit at bar is *in rem*, it must be decided under the maritime law and that under that law the liability of the owner of a vessel in cases like the present is limited to medical and surgical attendance and wages to the end of the voyage. But if the court has the right to apply to this case any part of the municipal law, sound reason and natural justice requires only that the owner of the vessel shall be bound to use reasonable care to furnish a seaworthy vessel, sufficient and safe appliances, and sufficient and competent seamen and officers, and that the law of assumption of risk should be applied to the seamen.

The master of a vessel, it is true, is vested with considerable power over the seamen, but he has not the power exercised by masters under ancient maritime law. He has, however, power to compel obedience by the seamen to his orders issued in the navigation and management of the vessel, by forfeiture of wages and imprisonment. R. S., Sec. 4596. But whatever power the master has,

he is invested with it *by the maritime law*, not by the owner of the vessel. The seaman knows this when he enters into his contract with the owner of the vessel and he impliedly promises to obey all lawful orders of the master, given in the navigation and management of the vessel. Why, then, is it not just and proper to say that he accepts the risk of injury from negligent orders given by a competent master in the navigation and management of the vessel?

There is, however, another question to be determined:

Is there any statute of Wisconsin which gave appellee a lien upon the vessel?

The constitution of Wisconsin fixes the center of Lake Michigan as the eastern boundary of the state, and expressly provides that the state has concurrent jurisdiction of all rivers and lakes bordering on the state so far as such rivers or lakes shall form a common boundary. Art. II., Sec. 1; Art. IX., Sec. 1.

The locality of the tort in question was in Lake Michigan about three miles from Milwaukee, and it may be that the legislature has power to create a lien for damages caused at the locality in question.

Section 3348, Revised Statutes of Wis., 1898, in force at the time of the accident to appellee, provides that every ship, boat or vessel used in navigating the waters of that state shall be liable for all damages arising from injuries done to persons or property by such ship, boat or vessel, and that the claims for such damages shall constitute a lien on such ship, boat or vessel which shall take precedence of all other claims or liens thereon.

What is the construction due to this statute?

The most reasonable and proper construction of this statute makes it apply to cases where the ship itself, and not one of its appliances, directly produces the damage as the last link in the chain of events commencing with negligence or misconduct in the navigation of the vessel as the first or proximate cause, and it is submitted that such is the construction due to this statute.

Assuming, however, that this statute extends to damages immediately caused by an appliance of the ship as the last link in the chain of events commencing with negligence in the management of the vessel as the proximate cause, it only makes the vessel liable in cases where its owner is liable *in personam* under other laws of the state. In other words, it does not create a cause of action, but merely a right in property in cases where the negligence or misconduct causing the damage gives rise to a cause of action *in personam*, and it means at most that when the owner of the vessel is liable *in personam* for the damages resulting from the tort, the person damaged shall have a lien upon the vessel to the amount of his damages.

There is no statute of Wisconsin making the owners of vessels

liable *in personam* under the facts certified in this case, hence it is clear that the question must be determined upon general law.

The Federal Courts enforce liens, created by State Statutes, upon vessels, when such statutes are not in conflict with the laws and usages of the United States, because, and only because, the lien touches a subject within the constitutional jurisdiction of the Federal Courts, and it necessarily follows that they cannot go beyond the State or Municipal Law creating the cause of action and lien.

Bigelow vs. Anderson's Adm., 34 U. S. App., 261, 273.
The City of Norwalk, 55 Fed. Rep., 98, 107, 108, 112.
Sherlock vs. Alling, 93 U. S., 104.
The Corsair, 145 U. S., 347.

It is, however, well settled that where a cause of action depends upon general law, the Federal Courts are not bound by the State decisions. Thus in *Baltimore & Ohio R. R. Co. vs. Baugh*, 149 U. S., 368, 370, Mr. Justice BREWER, in determining who are fellow servants, observed:

"This is not a question of local law, to be settled by an examination of the decisions of the Supreme Court of Ohio, the state in which the cause of action arose, and in which the suit was brought, but rather one of general law, to be determined by a reference to all the authorities, and a consideration of the principles underlying the relations of master and servant."

By the common law of Wisconsin the master is not liable to his servant for a personal injury caused by the negligence of a fellow servant, and whether the relation of fellow servants exists, in a given case, is not to be determined by the rank or grade of the offending servant, but by the nature of the act in the performance of which the injury was inflicted, without regard to the rank of the offending servant. If the negligence of the servant causing the injury was in respect to an act that the law implies a contract duty on the part of the master to perform, and the offending servant has been charged by the master with the performance of that act, then such servant is an agent of the master, but as to all other acts he is a fellow servant of the servant injured.

Dwyer vs. Am. Ex. Co., 82 Wis., 307-310.
Stutz vs. Armour, 84 Wis., 623.
Cadden vs. Am. Steel Barge Co., 88 Wis., 409.
Hartford vs. Railway Co., 91 Wis., 374.
Klochinski vs. Shores Lumber Co., 93 Wis., 417.
McMahon vs. Ida Mining Co., 95 Wis., 308.
Albrecht vs. Railway Co., 108 Wis., 530, 538.

In *Wiskie vs. The Montello Granite Co.*, 111 Wis., 443, 449, 450, nearly all of the Wisconsin cases are cited, together with many from the Supreme Court of the United States, including *New England R. R. Co. vs. Conroy*, 175 U. S., 323, and the court reaches the conclusion that the rule for determining who are fellow servants, is the same in the state and Federal Court.

Stated shortly the rule in Wisconsin is this:

All servants charged by the master with the duty of furnishing another servant with a place to work, or with appliances to work with, or with fellow servants, is an agent of the master for those purposes, but in every other case all servants of a common master, engaged in the same general undertaking, are fellow servants.

None of the Wisconsin cases cited involve maritime torts; there are, however, two such cases closely, at least, analogous in their facts, in which different conclusions were reached.

In *Thompson vs. Herman*, 47 Wis., 602, a member of a crew of a vessel sailing on Lake Erie, sued the owners—*one of whom was master*—to recover damages for a personal injury. The complaint alleged in substance that while the vessel was pitching and rolling heavily the jaw rope of the main gaff parted and caused the gaff to swing into the main rigging; that the plaintiff, with other seamen, was ordered by the master to adjust the gaff by standing upon the lower boom and pulling upon the bow line fastened to one of the horns of the jaw of the gaff; that the horn was very smooth and slippery, and for that reason the bow line was likely to slip from it when pulled upon, which facts were known to the master; that the plaintiff thinking it unsafe to obey the order of the master, objected and protested against the same and informed the master that the gaff could be adjusted by means of tackle, then at hand, with safety to all concerned; that the master refused to permit its use and imperatively ordered the work to be done in the way stated; that plaintiff obeyed and while pulling on the bow line, it slipped from the horn and caused the injury complained of.

The defendant demurred to the complaint, the demurrer was sustained and plaintiff appealed. Upon the argument of the appeal defendant claimed only that plaintiff assumed the risks and hazards of the business, and the court held, in substance, that the duty of a common seaman to yield unquestioning obedience to the commands of the master outside of port removed the case from the objection. It is difficult to tell what law the decision is based upon, but it would seem that the court supposed that it rested the decision upon the maritime law. Every maritime case cited, however, has relation to the liability of the vessel and its owners for injuries to cargo and have no relation to the question of the liability of the vessel and its owners to the crew for the negligent acts of the master in the navigation or management of the vessel.

In *Matthews vs. Case*, 61 Wis., 491, the mate of a vessel sued the owners for damages resulting from an injury caused by the negligence of the master. The complaint alleged, in substance, that the master negligently loaded and overloaded the vessel; that in consequence of such negligence the vessel sprung a leak; that afterwards a storm arose causing the vessel to leak badly; that at the time the vessel had not the usual appliances for securing the yawl boat and that it was, by the master's orders, negligently placed on the deck unfastened; that the hatch, near the yawl boat, was not fastened down and plaintiff attempted to fasten it; that while so engaged, the master, being at the wheel, negligently steered the vessel into the trough of the sea; that by reason thereof the vessel rolled and large quantities of water came on deck, and washed the yawl boat against the plaintiff and broke his leg. The complaint was demurred to; the demurrer was overruled and defendant appealed. After stating the foregoing facts the Supreme Court observed:

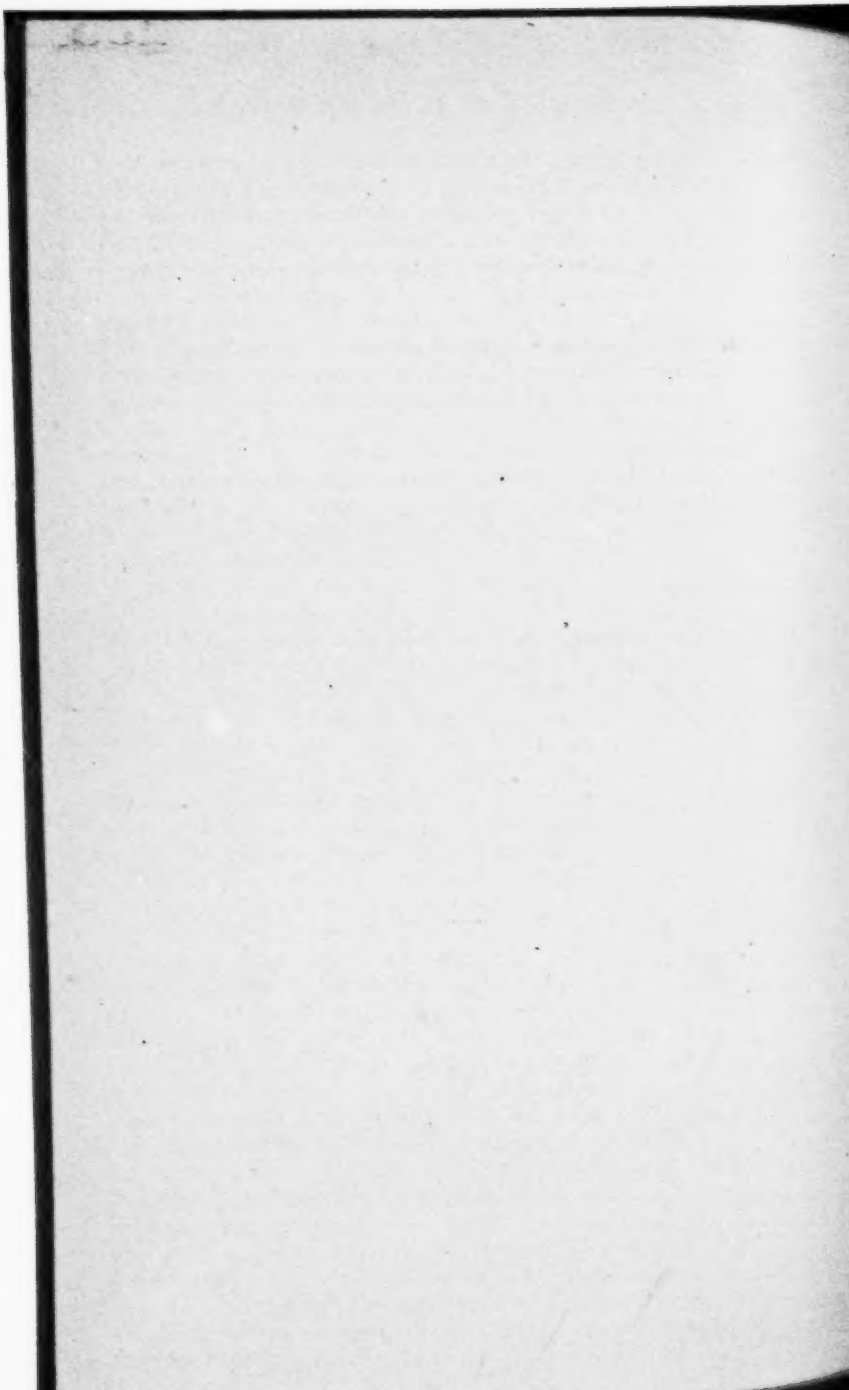
"It will be seen that whatever negligence there was, either in improperly loading the vessel, or in placing the yawl boat on deck without securely fastening the same, or in negligently steering the vessel into the trough of the sea, was the negligence of the master alone. There is no averment that the vessel was not properly equipped when she left the port of Milwaukee. It is only alleged that when the schooner encountered the storm there were not the usual and proper mechanical appliances upon the vessel for carrying and securing the yawl boat on deck. But *non constat* such appliances had not been furnished by the owner. If there were any omission of duty on the part of the owners in that regard, or in failing to equip the vessel properly on the outset of the voyage, or in the selection of a competent master, the fact should have been distinctly alleged. But the inference is irresistible, from the facts stated, that the injury was caused solely by the negligent acts of the master—unless there were contributory negligence—against which the owners could not guard. The owners were not present, and it was impossible for them to attend to the loading of the vessel, or to direct her management on the voyage. From the necessity of the case these duties had to be entrusted to the master and crew. On what ground, then, can it be claimed that the owners are responsible to the plaintiff for an injury resulting from the negligence of the master in loading and managing the vessel? Were not the mate and the master fellow servants, engaged in the same employment or common service? It seems to us they must be so regarded, and that the case comes within the familiar rule of law, which has been so frequently announced, by this and other courts, that the employer is not responsible for an injury to one employe through the negligence of another employe engaged in the same service or undertaking. There is no fact stated that will take the case out of that rule of law."

It will thus be seen that the court held in *Matthews vs. Case*, that in the matter of the navigation and management of the vessel, the master and mate were fellow servants. The case on its facts cannot be distinguished from *Thompson vs. Herman, supra*, as the duty of the mate of a vessel in respect to yielding obedience to the commands of the master is no different from that of a common seaman.

It is therefore apparent that the rule for determining who are fellow servants is the same in the State and Federal Court; that under the facts certified appellee and the master of the vessel were fellow servants and that the owners are not liable under the laws of the state.

In conclusion it is respectfully submitted that the first question should be answered in the negative, the second in the affirmative, and the third in the negative.

C. H. VAN ALSTINE,
Counsel for Appellee.



1351

No. 98.
Brf. of Roemer for Appellee

Office Supreme Court U.S.
FILED
DEC 1 1902
JAMES H. McKENNEY

Filed Dec. 1, 1902.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

No. 98.

WILLIAM F. BOTSFORD, HENRY McMORRAN AND T. R. WRIGHT,

Appellants,

vs.

PATRICK SHEA.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF APPELLEE.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1902.

No. 98.

WILLIAM F. BOTSFORD, HENRY McMORRAN AND T. R. WRIGHT,

Appellants,

vs.

PATRICK SHEA.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF APPELLEE.

The questions to be considered in this case are certified to this court by the United States Court of Appeals for the Seventh Circuit. The certificate is as follows:

"In this case, duly argued and submitted to this court, there arise questions of law concerning which this court desires the instruction and advice of the Supreme Court of the United States.

"The Appellee, Patrick Shea, exhibited his libel in the District Court of the United States, for the Eastern District of Wisconsin, against the steam propeller Osceola, her tackle, apparel and furniture, to recover damages for personal injuries sustained under the circumstances herein stated.

"At the hearing below, the District Court pronounced for the libellant awarding him damages for the injury sustained, and from the decree of that court in that behalf, the respondents below, the owners of the vessel, have appealed to this court.

"The owners had supplied the vessel with a moveable derrick for the purpose of raising the gangways of the vessel when in port, in order to discharge cargo. The appliance was in every respect fit and suitable for the purpose for which it was intended and furnished to be used, and at the time of the injury was in good repair and condition. The gangways which were to be raised by the derrick were each about ten feet long lengthwise of the ship, about seven feet high and weighed 1050 pounds. In the month of December, 1896, the vessel was on a voyage bound for the port of Milwaukee, and when within three miles of that port, and while in the open lake, the master of the vessel ordered the forward port gangway to be hoisted by means of the derrick, in order that the vessel might be ready to discharge cargo immediately upon arrival at her dock. At this time the vessel was proceeding at the rate of eleven miles an hour against a head of wind of eight miles an hour. Under the supervision of the mate, the crew, including the appellee Patrick Shea, who was one of the crew, proceeded to execute the order of the master. The derrick was set in place to raise the gangway. As soon as the gangway was swung clear of the vessel, the front end was

caught by the wind and turned outward broadside to the wind and by the force of the wind was pushed aft and pulled the derrick over, which in falling struck and injured the libellant. The negligence, if any there was, consisted solely in the order of the master that the derrick should be used and that the gangway should be hoisted while the vessel was yet in the open sea when the operation might be impeded and interfered with by the wind. The mate and the crew in executing the orders of the master of the vessel, acted in all respects properly, and were guilty of no negligence in the performance of the work. The libel charged negligence upon the owners of the vessel in "requiring and permitting the work of unshipping said gangway to be done while said vessel was at sea and running against the wind." The owners were not present upon the vessel, nor was the master a part owner of the vessel. It is contended that the vessel and its owners are liable for every improvident or negligent order of the captain in the course of the navigation or management of the vessel.

"The questions of law upon which this court desires the advice and instruction of the Supreme Court, are:

"First: Whether the vessel is responsible for injuries happening to one of the crew by reason of an improvident and negligent order of the master in respect of the navigation and management of the vessel.

"Second: Whether in the navigation and management of a vessel, the master of the vessel and the crew are fellow servants.

"Third: Whether as a matter of law the vessel or its owners are liable to the appellee, Patrick Shea, who was one of the crew of the vessel, for the injury sustained by him by reason of the improvident and negligent order of the master of the vessel in ordering and directing the hoisting of the gangway at the time and under the circumstances declared; that is to say, on the assumption that the order so made was improvident and negligent.

"These questions the court on this day orders certified and submitted to the Supreme Court of the United States for its proper decision."

ARGUMENT.

The questions certified may be considered together, for if a vessel or its owners are responsible, as a matter of law, to an ordinary seaman for an improvident or negligent order of the master in respect to the navigation or management of the vessel, whereby the seaman sustains personal injuries, then the first and third questions certified should be answered in the affirmative, and the second question in the negative.

The proceeding in this case is *in rem*, and therefore, at the very threshold of the cause, is presented the question whether a maritime lien exists, in favor of the appellee under the facts as set forth in the certificate. Unless a lien exists by virtue of the Statute of Wisconsin or by the maritime law, or unless appellants have waived the objection by appearing personally, giving an undertaking for the release of the vessel and litigating upon the merits, the action cannot be maintained.

The sovereignty of the State of Wisconsin extends to the center of Lake Michigan, and its laws so far as they do not conflict with the laws of the United States passed in the regulation of commerce and navigation are operative within the boundaries of that state. The boundaries of the state of Wisconsin are fixed by Secion 1 of Article II of its constitution. Section 1, Article IX, of its constitution gives the state "concurrent jurisdiction on all rivers and lakes bordering on the state so far as such rivers or lakes shall form a common boundary."

"It is also settled that, if a state statute gives a right of action touching a subject of maritime nature, the admirality can administer the law by a proceeding *in rem*, if the statute grants a lien, or *in personam*, no lien being granted."

The Corsair, 145 U. S., 335.
Bigelow vs. Nickerson, 70 Fed. Rep., 113.

Sec. 3348, Wisconsin Statutes of 1898, provides as follows: "Every ship, boat or vessel in navigating the waters of this state shall be liable for and the claims or demands hereinafter mentioned shall constitute a lien on such ship, boat or vessel"

* * * * * * * "For all damages arising from injuries done to persons or property by such ship, boat or vessel;" * * * * * * * "Such lien may be enforced by proceeding in admirality, etc."

Whether this statute creates any new cause of action or merely deals with causes already maintainable at common law or in admiralty has never yet been determined by judicial construction. To subserve any beneficial purpose, however, it would seem that in passing the act the legislature intended to make every ship, boat or vessel navigating the waters of Wisconsin responsible in every case of injury to persons or property when the injury results from a marine tort whether the ship, boat or vessel or its owners would be liable independent of statute or not.

But if the statute merely applies to causes *in personam* already maintainable under the statute, the common, or the maritime law, it is submitted that it is effective to create liens in all cases within its scope, and that such liens may be enforced by proceeding *in rem* in admiralty.

Mendell vs. The Martin White, Hoff. Op. 450; Case No. 9, 419 Fed. Cases.
The J. E. Rumbell, 148 U. S., 1.
The Oregon, 45; Fed. Rep., 62.
The Oregon, 158 U. S., 186.
The J. F. Warner, 22 Fed. Rep., 342.

ADMIRALTY JURISDICTION.

The subjects of admiralty jurisdiction includes "all affairs relating to mariners, whether ship officers, or common mariners, their rights and privileges respectively; their office and duty; their wages; their offences whether by willfulness, casualty, ignorance, negligence, or insufficiency, with their punishments."

Chamberlain vs. Chandler, 3 Mason, 242.

The Rule of the English Courts that unless the owner is liable

at common law, the vessel cannot be held in admiralty, has been rejected in this country.

Homer Ramsdall Transportation Co., vs. La Campagni Generale Transatlantique, 182 U. S., 406.

"Even in cases of marine torts, independent of prize, courts of admiralty are in the habit of giving or withholding damages upon enlarged principles of justice and equity, and have not circumscribed themselves within the positive boundaries of mere municipal law. They have exercised a conscientious discretion on the subject."

The Mariana Flora, 11 Wheat., 54.
The Palmyra, 12 Wheat., 1.
The Explorer, 20 Fed. Rep., 135.
The Wanderer, 20 Fed. Rep., 140.
The Max Morris, 24 Fed. Rep., 860.
The Max Morris, 28 Fed. Rep., 881.
Steamer Max Morris vs. Curry, 137 U. S., 1.

If it should be determined that the proceeding should have been commenced *in personam* and not *in rem*, the question cannot be raised at this time.

The appellants personally appeared in the action, gave a bond for the release of the vessel and answered the libel. By thus appearing they became parties to the action and not havnig raised the objection by exception to the libel must be deemed to have waived the same. Even if the libel should not contain sufficient allegations to show a cause of action against the appellants *in personam* such amendments would be permitted after decree.

Betts Adm. Pr., 99.
The Zenobia 1, Abb. Adm., 48.
Roberts vs. Huntsville, 3 Woods, 386.
The Union, 4 Blatchf., 90.
The White Squall, 4 Blatchf., 103.
The Monte A., 12 Fed. Rep., 331.
The Williamette, 70 Fed Rep., 874.
Leathers vs. Blessing, 105 U. S., 626.

Chamberlin vs. Ward, 62 U. S., 554.
The Charles Morgan, 115 U. S., 69.
2 Brown Civil & Adm. Law, p. 400.
The Warren, 2 Ben., 498.
The Bilboa, Lush, 149.

The reported cases show that there is a conflict of opinion as to whether or not the vessel and its owners are liable in admiralty for the negligence of the master in the management and navigation of the ship, proximately causing injury to an ordinary seaman. The line of cases holding that the vessel and its owners are responsible in such cases is certainly supported by the better reasoning.

Peterson vs. The Chandos, 4 Fed Rep., 645.
The Clatsop Chief, 8 Fed. Rep., 163.
The Titan, 23 Fed. Rep., 413.
The A. Heaton, 43 Fed. Rep., 592.
The Julia Fowler, 49 Fed. Rep., 277.
The Frank and Willie, 45 Fed. Rep., 494.
McCullough's Admx. vs. Steamboat Co., 20 U. S. App., 570; 61 Fed. Rep., 364.

In Peterson vs. The Chandos, *supra*, Deady, D. J., says, "But the mate being the immediate agent and representative of the master—his very right hand, as it were—acting within his view and under his personal direction, I think he ought not to be considered the fellow servant of the men in the forecastle within this rule, but rather the *locum tenens* of the master and owner, for whose negligence, resulting in injury to any of the crew while in the correct discharge of their duty, the *vessel* and master ought to be responsible.

"The relation between the master and sailor at sea is more of a parental character than that between the employer and employee on shore—particularly in the great transportation lines, workshops, and factories of modern times; and therefore, the former may and do rely more for their safety and well-being upon the foresight and personal direction of those in authority over them

than the latter. Again, an employee on shore, who is unwilling to incur the risk arising from the negligence or want of skill of a fellow servant, may ordinarily quit such employment, but a seaman must remain on board, at least until a port is made, however unskillful or negligent the mate may be."

In the Clatsop Chief, *supra*, Deady, D. J., says, "And while it does appear that the deceased was in the service of the same person as the master, and engaged in the same general employment, it does not follow from this that he was a fellow servant of the master in that sense which would exonerate the common employer from liability for an injury to one of them caused by the negligence or misconduct of the other.

"The deceased was merely a fireman on the Chief, and as such subject to the orders of the master. He was an inferior servant injured by the misconduct of a superior one, for which injury there is much authority and more reason for holding the common employer liable."

In The Titan and The Hills, *supra*, it was held that a deck hand may recover for an injury caused by a collision due to the negligence of a pilot who was at the time in command; following Chicago, M. & St. P. Ry. Co. vs. Ross, 112 U. S., 377. Wallace J.: "Treating the pilot as the master, he was responsible for the management and navigation of his vessel. He was negligent in failing to have a lookout stationed where he ought to have been, and negligent otherwise. The collision was solely the result of his negligence, and the libelant had no part or lot in it."

In A. Heaton, *supra*, it was held that a seaman, permanently injured in the performance of his duty on ship, particularly in consequence of the negligence of the master in not keeping a rope in proper condition and repair can maintain a libel against the ship to recover damages for the injury. Mr. Justice Gray, speaking for the Court, says, "The case is thus resolved into the question of law, whether a seaman, permanently injured in the performance of his duty, on shipboard, in consequence of the negligence of the master in not keeping a rope in proper condition and repair, can maintain a libel in admiralty against the ship to recover damages for the injury, beyond his wages to the end

of the voyage and the expenses of his cure, so far as the injury is susceptible of cure. This question, both as to the jurisdiction and as to the merits, appears to us to be substantially determined by the decision of the Supreme Court. In England, indeed, it appears to be unsettled whether a libel *in rem* can be maintained in admiralty for a personal injury. But on principle, as observed by a recent English writer, it would seem difficult to deny the justice of the view that personal injuries inflicted by a ship might confer a maritime lien, or to formulate a satisfactory reason why damages occasioned to a mans' property should give rise to rights of a higher nature, or be the subject of a more effective remedy, than an injury occasioned under the same circumstances to his person. 4 Law Quar. Rev., 388. In this country, it has been established by a series of judgments of the Supreme Court of the United States, that a libel in admiralty may be maintained against the ship for any personal injury, for which the owners are liable under the general law and independently of any local statute; accordingly passengers have often maintained libels, as well against the ship carrying them as against other ships, for personal injuries caused by negligence for which the owners of the ship libelled were responsible. The New World, 16 How., 469; The Washington, 9 Wall., 513; The Juniata, 93 U. S., 337; The City of Panama, 101 U. S., 453, 462. The sixteenth rule in admiralty, which directs that 'in all suits for an assault or beating upon the high seas, or elsewhere within the admiralty and maritime jurisdiction, the suit shall be *in personam* only,' does not effect libels for negligence. It was argued in behalf of the owners that they were not responsible to the seamen for the negligence of the master, because the two were fellow servants; and a Scotch case was cited, where in an action at law it was so held. Leddy vs. Gibson, 11 Ct. Secc. Cas., (3d Ser.) 304. But we are unable to reconcile that decision with the recent judgment of the majority of the Supreme Court in Railway Co. vs. Ross, 112 U. S., 337, 5 Sup. Ct. Rep., 184, which conclusively binds this court." The point there decided as stated by Mr. Justice Field in delivering judgment was that the conductor of a railway train, who commands its movements,

directs when it shall start, at what stations it shall stop and at what speed it shall run, and has the general management of it and control over the persons employed upon it, is in no proper sense a fellow servant with the fireman, the brakeman, the porters, and the engineer upon the train, but represents the company and therefore, for injuries resulting from his negligent acts, the company is responsible. 112 U. S., 390, 394; 5 Sup. Ct. Rep., 190, 192. The reasoning, upon which it was there held that the engineer might maintain an action against the owner of the railroad train for the negligence of the conductor, applies with greater force to a suit by a seaman against the owners of a vessel for negligence of the master, while she is at sea, beyond the reach of the owners, and the seaman is subject to the absolute control of the master, and cannot, if he would, leave the vessel or throw up his engagement. No reason can be assigned why the owners of a vessel should be held less liable to a seaman for the negligence of the master in a court of admiralty than in a court of common law. Courts of admiralty have always considered seamen as peculiarly entitled to their protection. Seamen may recover their wages by libel *in personam* against either the owners or the master, or by libel *in rem* against the ship. Sheppard vs. Taylor, 5 Pet., 675, 711; Bronde vs. Haven, Gilp., 592; Temple vs. Turner, 123 Mass., 125, 128; Rule 13 in Admiralty. Their lien on the ship or its proceeds takes precedence of all other claims, except, perhaps, claims for salvage, or for damages by collision owing to the fault of their ship. Hen. Adm., Sec. 69, and cases cited; Norwich Co. vs. Wright, 13 Wall., 104, 122. A seaman, taken sick or injured or disabled in the service of the ship, has the right to receive his wages to the end of the voyage, and to be cured at the ship's expense. That right, indeed, grounded solely upon the benefit which the ship derives from his service, and having no regard to the question whether his injury has been caused by the fault of others or by mere accident, does not extend to compensation or allowance for the effects of the injury; but it is in the nature of an additional privilege, and not of a substitute for a restriction of other rights and remedies. Harden vs. Gordon, 2 Mason, 541; The George, 1 Sum., 151;

Reed vs. Canfield, Id., 195, 199, 202. It does not, therefore, displace or effect the right of the seaman to recover against the master or owners for injuries by their unlawful or negligent acts. In Sherwood vs. Hall, 3 Sum., 127, Mr. Justice Story, sitting in admiralty, held that the act of the master shipping a minor as a seaman, knowing it to be against the will of his father, was a tort for which the owners of the ship were responsible in damages to the father, although positive and direct knowledge of the facts was not brought home to them; and said:

"Constructive notice is brought home to them by the knowledge of their agent, the master. * * * Upon the well-established principles of the maritime law, in cases of this sort, the owners are responsible for the torts of the master in acts relative to the service of the ship, and within the scope of his employment in the ship. * * * In cases of collision, and injuries from negligence and illegal captures, and other torts from the fault of the master, the owners are, by the maritime law, made responsible for his acts and omissions of duty." Id. 131, 132.

In Leathers vs. Blessing, 105 U. S., 626, 628, a merchant, who had gone on board a vessel expecting to find goods consigned to him, and had been there injured by the fall of a bale of cotton which, as the master knew, had been insecurely stowed, maintained a libel against the owners as well as the master; and it was assumed that the libellant's case would have been clear if he had been an officer, seaman, passenger, or freighter. In the high court of admiralty of England, Dr. Lushington, in a collision cause, while awarding damages to the owners of the vessel not in fault, denied them costs, because her master had not ordered out a boat to save the life of a seaman who had fallen overboard from the guilty vessel and was drowned; and said:

"I must hold here, and I ever shall hold, that the owners of a vessel are responsible for the whole conduct of the master whilst on board his vessel, and in command of that vessel. I do not mean to say that they can be responsible, criminally speaking, for an act he may have committed of a criminal nature, for, of course, in that case the responsibility and the punishment can attach only to the wrong-doer; but, civilly speaking, the owners

are responsible for any deviation from that line of conduct which it behooves a master to perform, not simply in the navigation of the vessel, and in the care of his own seamen, but in the care of those who may be thrown on board his ship by an accident of this description, and for the performance of any office of humanity. The St. Lawrence, 7 Notes Cas., Adm. & Ecc., 566, 559, 14 Jur., 534."

In the case of The Julia Fowler, *supra*, the mate was in command of a vessel and under his direction and inspection a triangle was rigged surrounding the mast on which the seamen were at work scraping the main mast. The rope which held the triangle, was improperly attached and of doubtful sufficiency. The rope gave way and a seaman at work upon the triangle fell upon the deck and sustained personal injuries. A libel was filed against the vessel for personal injuries. It was said, "The negligence of the master, or chief officer who acts in the master's place, to provide safe appliances for the use of the seaman, and the deliberate use of rigging or *methods plainly unsafe*, affects both ship and owners with liability for the consequent damages. * * * The libelant had nothing to do with preparing or rigging the triangle; but when it was ready, he was ordered aloft to work upon it, and obeyed."

It was held in The Frank and Willie, *supra*, that where a dangerous manner of unloading a cargo is known to the mate while in charge of a vessel, and continued, and a seaman is thereby injured, the vessel is liable for the injury. It was said in the opinion: "It has been long held the ship's duty to use all reasonable means to cure seamen or their hurts in the ship's service, the neglect of which makes ship and owner liable. It would be anomalous to enforce such a duty to cure hurts, but none to avoid them."

In McCullough's, Admx., vs. Steamboat Co., *supra*, the master of a steamboat, while in command and directing her movements, was held to be a vice-principal of the owner, and not a fellow servant of the engineer, so as to prevent recovery of damages from the owner for the death of the engineer by a collision due in part to the master's *negligence*.

To the same effect see also Keating vs. Pac. Steam Whaling Co., 21 Wash., 415.

Now adverting to the cases in admiralty holding that the master and common seaman are fellow servants, it will be observed upon examination that in each case the act which resulted in the injury did not result from the mere matter of control of the seamen or the management and navigation of the vessel.

In The Miami, 93 Fed., Rep. 218, it was held that where the mate of a vessel after giving an order to certain seamen, proceeded to assist in its execution and by their negligence another seaman was injured, the mate, while so engaged, was not acting as a master or vice-principal, but as a co-employee; and hence that the ship was not liable for the injury so received. The court says: "There is no force, therefore, in any suggestion that an improper or negligent order of the mate caused the accident. That officer undertook to carry out his own order. * * * When participating in this particular work the mate was not acting as master or vice-principal, but as an ordinary seaman or, at most as the foreman of a gang performing ordinary seaman's work."

In Oleson vs. Oregon Coal & Navigation Co., 44 C. C. A., 51; 104 Fed. Rep., 574, the negligence claimed consisted in the leaving open of the after hatch of the ship, through which the libellant fell. The injury was, therefore, not the result of any negligence or improper order of the master in the management or navigation of the vessel. It was not even shown that the mere leaving open of the hatch was due to the negligence of any officer of the ship.

CASES AT LAW.

The principal cases relied upon by claimants in support of their contention that the master of the vessel and the appellee were fellow servants, are cases brought and tried in common law courts and are clearly distinguishable from the case at bar.

The case of Gabrielson vs. Waydell, 135 N. W., 1, has no

application to the case at bar in support of the appellant's contention. That case held that the owners of the vessel could not be held liable for the willful and malicious beating of a seaman by the master of a vessel while upon the high seas for the reason that such an act, being of a criminal nature, is not in violation of any duty imposed upon the owners by maritime law. That decision may briefly be stated as follows: If the master while in control of the crew, should assault, and beat one of them causing him great bodily injury, the owner will not be liable; but when the negligent act complained of arises out of and is the direct result of the authority over the crew conferred upon the master by the owner, the owner is liable. That case, therefore, strongly supports the contention of the libellant that with respect to the giving of the improper and inconsiderate order to take out the gangways under the conditions then existing, the necessary obedience to which order resulted in the libellant's injury, the master was the representative of the owner and not the fellow servant of the libellant.

The case of Hedley vs. Pinkey & Sons Steamship Co., 1, L. R. Q. D., 58, is based upon the doctrine of Wilson vs. Merry, which has been frequently referred to in the courts of this country, but never accepted unqualifiedly by any of them. The severity of the doctrine and its manifest injustice led to the passage of the Employers' Liability Act in England. Sherman and Redfield on Negligence (5th Ed.), Sec. 227, 228. In the Hedley case the injury was not in consequence of the obedience to the orders of the master of the vessel. It was the result of the careless omission on the part of the master of the vessel in performing work of a fellow servant, and not of the negligent exercise of his power and authority over the crew.

In Kelleck vs. Deering, 161 Mass., 469, the injury was caused by the negligence of the mate in constructing a triangle and ordering the seamen to use it. It was held that the owner was not liable for the reason that the negligence of the mate was that of a fellow servant of the injured man. Holmes, J., who wrote the opinion for the court, refers to the case of the A. Heaton, The Frank & Willie and Julia Fowler as being rendered in defer-

ence to the Ross case, which latter case is in conflict with the doctrine of the Massachusetts' Supreme Court. However, at the conclusion of the opinion, is found the following significant statement, "Under these circumstances the Circuit Court cases, (referring to The Heaton, The Frank & Willie and Julia Fowler) do not seem to us a sufficient reason for departing from the common law because the accident happened on board ship. Moreover it is very plain that we cannot adopt the admiralty law as a whole. We cannot divide the damages when the plaintiff has been guilty of contributory negligence as was done in The Julia Fowler."

The only case in which the precise point in question has been squarely raised and decided is the case of Thompson vs. Hermann, 47 Wis., 602. The complaint charged that while a heavy sea was running, and the vessel was pitching and rolling heavily, the jaw rope of the main gaff parted and the gaff was unshipped and swung over into the main rigging, and that the plaintiff, with other seamen, was ordered by the master to adjust the gaff, by standing upon the lower boom, and pulling upon the bow-line fastened to one of the horns of the jaw of the gaff, and which was very likely and apt to slip from said horn, which was very smooth, worn and slippery, and cause plaintiff to fall from the boom to the deck below and sustain injuries. Upon a demurrer to the complaint it was held that the common seamen on a vessel at sea is bound to submit to the judgment and discretion of the master and obey his orders and the fact that a seaman, on receiving from the master an order, and being commanded to perform it in a manner or by means unnecessarily dangerous, and is injured in consequence of his obedience to such order, will not prevent him from recovering from the owners for the personal injuries caused by the master's negligence. The opinion is replete with authorities and worthy of careful consideration. It has never been doubted, questioned or criticised by the Supreme Court of Wisconsin in any case since. The case of Matthews vs. Case, 61 Wis., 491, notwithstanding appellants' contention, is not in conflict with the views expressed in the Thompson case. An examination of the cases will show that they are in harmony,

and clearly illustrate the vital distinction. In the Matthews case the injury was due to the mate's own negligence, and not to that of the master.

It is contended by appellants that if the second question certified is to be decided according to the common law, the question must be answered in the affirmative upon the authority of the case of Railway Co. vs. Conroy, 175 U. S., 323. The general rule exempting the common master from liability to one servant for injuries caused by the negligence of a co-servant, is not disputed. It is also conceded that the reason of the rule, according to the better considered cases and weight of authority, is that the ordinary risks of the employment, of which the negligence of co-employees is one, are taken into consideration by both parties in agreeing upon the terms of the contract of employment, and the compensation for the same, and that, therefore, every person entering the service of another impliedly agrees to take upon himself all the ordinary risks of the employment, including the negligence of competent fellow servants.

Union Pacific Ry. Co. vs. Fort, 17 Wall, (U. S.), 553.
Railway Co. vs. Ross, 112 U. S., 377.

But to the general rule there are certain well defined exceptions, which arise where the reason of the rule ceases, and are recognized by both State and Federal courts. Some of these exceptions are applicable to the case at bar.

Where a master abdicates from control and management of his business, and puts the whole power of superintendence into other hands, he necessarily has one or more vice-principals. It is, therefore, universally agreed in America that any person to whom is committed under such circumstances the entire control of all the servants, including the power to hire and discharge, is a vice-principal for whose negligence in the matter of the control of the servants, and the management of the business, the master is liable to the servants. It is in like manner agreed that the manager of any distinct department of a varied and extended business, having such power in his department, is a vice-principal with respect thereto.

Sherman & Redfield on Negligence (5th Ed.), Sec. 230.
Railway Co. vs. Ross, 112 U. S., 377.
Railway Co. vs. Baugh, 149 U. S., 364.
Railway Co. vs. Peterson, 162 U. S., 347.
Railway Co. vs. Keegan, 160 U. S., 259.
Railway Co. vs. Conroy, 175 U. S., 323.

The so-called New York rule, as announced in Crispin vs. Babbitt, 81 N. Y., 516, and confirmed by later decisions of that court, has been generally followed in this country. The English rule, which practically refuses to recognize the doctrine of vice-principal, is not followed by any American court.

"Under any consistent application of the New York rule, therefore, the master is represented, as by a vice-principal, by any one to whom he deputes the power of giving orders, which must be obeyed without or before appeal, and he is responsible for those orders as much as though they were his own. His deputy in these and all similar respects is his vice-principal."

Sherman & Redfield on Negligence (5th Ed.), Sec. 233 and cases cited.
20 Am. & Eng. Ency. of Law, 147.
Johnson vs. First National Bank, 79 Wis., 414.

While the Conroy case in express terms overrules the Ross case, and rejects the superior servant limitation as recognized in Ohio and Kentucky, it does not abolish the vital distinction between the relation of a vice-principal, who is invested with the whole power of superintendence, and that of a superior servant, either a boss or a foreman of a gang of men engaged in doing a certain piece of work.

Mr. Justice Shiras, speaking for the court in the Conroy case, says, after reviewing a number of cases, on page 340, "Without attempting to educe from these cases a rule applicable to all possible circumstances, we think we are warranted by them in holding in the present case that, in the absence of evidence of *special and unusual powers* having been conferred upon the conductor of the freight train, he, the engineer, and the brakeman, must be

deemed to have been fellow servants within the meaning of the rule which exempts the railroad company, their common employer, from liability to one of them for injuries caused by the negligence of another." Also on pages 346 and 347, "To conclude, and not subject ourselves to our own previous criticism of proceeding upon assumptions not founded on the evidence in the case, we shall content ourselves by saying that, upon the facts stated and certified to us by the judges of the Circuit Court of Appeals, we cannot, as a matter of law, based upon those facts and upon such common knowledge as we, as a court, can be supposed to possess, hold a conductor of a freight train to be a vice-principal, within any safe definition of that relation."

See the following cases:

Harrison vs. Railroad Co., 77 Mich., 409.
Malcolm vs. Fuller, 152 Massachusetts, 428.
Carlson vs. N. W. Telephone Exchange Co., 63 Minnesota, 428.
Tailor vs. Railway Co., 121 Indiana, 124.
Railway Co. vs. May, 108 Illinois, 288.
Gormley vs. Vulcan Iron Works, 61 Missouri, 492.
Smith vs. Wabash Railway Co., 92 Missouri, 366.
Schroeder vs. Railway Co., 108 Missouri, 322.
Lasky vs. Railway Co., 83 Maine, 461.
Patton vs. Railway Co., 96 North Carolina, 455.
McGovern vs. Railway Co., 123 New York, 281.
Eldredge vs. Steamship Co., 134 New York, 187.
Railroad Co. vs. Fort, 17 Wallace, 553.
Borgman vs. Railway Co., 41 Federal, 667.
Thompson vs. Railway Co., 14 Federal, 564.

The analogies of the general rule of the municipal law exempting the master from liability for injury to a servant caused by the negligence of a fellow servant, do not apply to the master of a vessel and ordinary seamen when the vessel is at sea. On land, if an incompetent or unfit servant is introduced or retained in the service of the master, a fellow servant has the right, growing out of the contract, to demand of the master correction of the wrong, and, if not done to quit the service. He has the means of protect-

ing himself against negligent and improper orders of those he is obliged to obey and can leave the employment of the common master if obedience to an order involves his personal safety. However, under the maritime law the master of the ship has plenary powers, as the agent and representative of the owners. He selects, hires and discharges the seamen at his pleasure. He has absolute and supreme control of the management and navigation of the vessel with which the owners themselves cannot interfere. He determines all matters of discipline, and the kind of punishment to be inflicted for disobedience to the orders of the officers of the ship. While on ship board he is "master" in fact as well as in name. He is absolute monarch and his word is law and for disobedience to his orders the crew, passengers and all persons on board the ship, can be disciplined in his discretion. He may, when necessary, purchase supplies upon the credit of the ship, and in certain emergencies, hypothecate and even sell it without the knowledge or consent of the owners. It would be hard to conceive of a case in which the owners have delegated a more complete authority and control. They are not in charge of the vessel but remain upon the land. The mere fact that the maritime law gives certain powers to the master is not a reason for exempting the owners from liability for an improper exercise of such powers. While exercising the powers thus conferred the master is acting in the interest, and for the benefit, of the owners who appoint him. One of the purposes for which the master is employed is to exercise authority and control over the crew in the management and navigation of the ship; in the exercise of that authority and control he is the representative of the owners and not the fellow servant of the crew.

It is submitted that if the questions certified are to be determined upon the principles of the maritime law, or even upon those of the common law applicable as recognized in the best considered cases, the first and third questions should be answered in the affirmative, and the second question in the negative.

JOHN H. ROEMER,
Counsel for Appellee.

Supreme Court of the United States.

No. 98.—October Term, 1902.

The Osceola. } On certificate from the United States Circuit Court of Appeals for the Seventh Circuit.

[March 2, 1903.]

This was a libel *in rem* filed in the District Court for the Eastern District of Wisconsin, in admiralty, against the propeller Osceola, to recover damages for a personal injury sustained by one Patrick Shea, a seaman on board the vessel, through the negligence of the master.

The case resulted in a decree for the libellant, from which an appeal was taken by the owners to the Circuit Court of Appeals, which certified to this court certain questions arising upon the following statement of facts:

"The owners had supplied the vessel with a movable derrick for the purpose of raising the gangways of the vessel when in port, in order to discharge cargo. The appliance was in every respect fit and suitable for the purpose for which it was intended and furnished to be used, and at the time of the injury was in good repair and condition. The gangways which were to be raised by the derrick were each about ten feet long lengthwise of the ship, about seven feet high and weighed about 1,050 pounds. In the month of December, 1896, the vessel was on a voyage bound for the port of Milwaukee, and when within three miles of that port, and while in the open lake, the master of the vessel ordered the forward port gangway to be hoisted by means of the derrick, in order that the vessel might be ready to discharge cargo immediately upon arrival at her dock. At this time the vessel was proceeding at the rate of eleven miles an hour against a head wind of eight miles an hour. Under the supervision of the mate, the crew, including the appellee Patrick Shea, who was one of the crew, proceeded to execute the order of the master. The derrick was set in place to raise the gangway. As soon as the gangway was swung clear of the vessel, the front end was caught by the wind and turned outward broadside to the wind, and by the force of the wind was pushed aft and pulled the derrick over, which in falling struck and injured the libellant. The negligence, if any there was, consisted solely in the order of the master that the derrick should be used and that the gangway should be hoisted while the vessel was yet in the open sea when the operation might be impeded and interfered with by the wind. The mate and the crew in executing the orders of the master of the vessel acted in all respects properly, and were guilty of no negligence in the performance of the work. The libel charged negligence upon the owners of the vessel in 'requiring and permitting the work of unshipping said gangway to be done while the said vessel was at sea and running against the

wind.' The owners were not present upon the vessel, nor was the master a part owner of the vessel. It is contended that the vessel and its owners are liable for every improvident or negligent order of the captain in the course of the navigation or management of the vessel."

The questions of law upon which that court desired the advice and instruction of the Supreme Court are—

"First. Whether the vessel is responsible for injuries happening to one of the crew by reason of an improvident and negligent order of the master in respect of the navigation and management of the vessel.

"Second. Whether in the navigation and management of a vessel, the master of the vessel and the crew are fellow servants.

"Third. Whether as a matter of law the vessel or its owners are liable to the appellee, Patrick Shea, who was one of the crew of the vessel, for the injury sustained by him by reason of the improvident and negligent order of the master of the vessel in ordering and directing the hoisting of the gangway at the time and under the circumstances declared; that is to say, on the assumption that the order so made was improvident and negligent."

Mr. Justice BROWN delivered the opinion of the Court.

In the view we take of this case we find it necessary to express an opinion only upon the first and third questions, which are in substance whether the vessel was liable *in rem* to one of the crew by reason of the improvident and negligent order of the master in directing the hoisting of the gangway for the discharge of cargo, before the arrival of the vessel at her dock, and during a heavy wind. As this is a libel *in rem* it is unnecessary to determine whether the owners would be liable to an action *in personam*, either in admiralty or at common law, although cases upon this subject are not wholly irrelevant.

If the rulings of the District Court were correct, that the vessel was liable *in rem* for these injuries, such liability must be founded either upon the general admiralty law or upon a local statute of the State within which the accident occurred. As the admiralty law upon the subject must be gathered from the accepted practice of courts of admiralty, both at home and abroad, we are bound in answering this question to examine the sources of this law and its administration in the courts of civilized countries, and to apply it, so far as it is consonant with our own usages and principles, or, as Mr. Justice Bradley observed in *The Lottawanna*, (21 Wall. 558,) "having regard to our own legal history, Constitution, legislation, usages and adjudications."

By Article VI of the Rules of Oleron, sailors injured by their own misconduct could only be cured at their own expense, and might be discharged; "but if, by the master's order and commands, any of the ship's company be in the service of the ship, and thereby happen to be wounded or otherwise hurt, in that case they shall be cured and provided for at

the cost and charges of the said ship." By Article 18 of the Laws of Wisbury, "a mariner being ashore in the master's or the ship's service, if he should happen to be wounded, he shall be maintained and cured at the charge of the ship," with a further provision that, if he be injured by his own recklessness, he may be discharged and obliged to refund what he has received. Practically the same provision is found in Article 39 of the Laws of the Hanse Towns; in the Marine Ordinances of Louis XIV, Book III, Title 4, Article 11; and in a Treatise upon the Sea Laws, published in 2 Pet. Admiralty Decisions. In neither of these ancient codes does there appear to be any distinction between injuries received accidentally or by negligence, nor does it appear that the seaman is to be indemnified beyond his wages and the expenses of his maintenance and cure. We are also left in the dark as to whether the seaman in such a case has recourse to the ship herself or is remitted to an action against the owners.

By the modern French Commercial Code, (Art. 262,) "seamen are to be paid their wages, and receive medical treatment at the expense of the ship, if they fall sick during a voyage, or be injured in the service of the vessel." Commenting upon this article, Goirand says in his commentaries upon the French Code, that "when a sailor falls ill before the sailing of the vessel, he has no right to his wages; if he becomes ill during the voyage, and from no fault of his own, he is paid his wages, and tended at the expense of the ship," and if he is left on shore, the ship is also liable for the expense of his return home; and under Article 263 the same treatment is accorded to sailors wounded or injured in the service of the ship. The expenses of treatment and dressing are chargeable to the ship alone, or to the ship and cargo, according to whether the wounds or injuries were received in the service of the ship alone, or that of the ship and cargo."

Similar provisions are found in the Italian Code, Article 363; the Belgian, Article 262; the Dutch, Articles 423 and 424; the Brazilian, Article 560; the Chilian, Article 944; the Argentine, Article 1174; the Portuguese, Article 1469; the Spanish, Articles 718 and 719; the German, Articles 548 and 549. In some of these codes, notably the Portuguese, Argentine and Dutch, these expenses are made a charge upon the ship and her cargo and freight, and considered as a subject of general average. By the Argentine Code, Article 1174, the sailor is also entitled to an indemnity beyond his wages and cure in case of mutilation; and by the German Code he appears to be entitled to an indemnity in all cases for injuries incurred in defense of his ship; and by the Dutch Code, the sailor, if disabled, is entitled to such damages as the judge shall deem equitable. In all of them there is a provision against liability in case of injuries received by the sailor's wilful misconduct.

Except as above indicated, in a few countries, the expense and maintenance and cure do not seem to constitute a privilege or lien upon a

ship, since by the French Code, Article 191, classifying privileged debts against vessels, no mention is made of a lien for personal injury. The other Continental and South American codes do not differ materially from the French in this particular. Probably, however, the expenses of maintenance and cure would be regarded as a mere incident to the wages, for which there is undoubtedly a privilege.

By the English Merchants' Shipping Act, (17 & 18 Vic. chap. 104, sec. 228, subd. 1,) "if the master or any seaman or apprentice receives any hurt or injury in the service of the ship to which he belongs, the expense of providing the necessary surgical and medical advice, with attendance and medicines, and of his subsistence until he is cured, or dies, or is brought back to some port in the United Kingdom, if shipped in the United Kingdom, or if shipped in some British possession to some port in such possession, and of his conveyance to such port, and the expense (if any) of his burial shall be defrayed by the owner of such ship, without any deduction upon that account from the wages of such master, seaman or apprentice."

These provisions of the British law seem to be practically identical with the Continental codes. In the English courts the owner is now held to be liable for injuries received by the unseaworthiness of the vessel, though not by the negligence of the master, who is treated as a fellow servant of the owner. Responsibility for injuries received through the unseaworthiness of the ship is imposed upon the owner by the Merchants' Shipping Act of 1876, (39 & 40 Vic. chap. 80, section 5,) wherein in every contract of service, express or implied, between an owner of a ship and the master or any seaman thereof, there is an obligation implied that all reasonable means shall be used to insure the seaworthiness of the ship before and during the voyage. (*Hedley* v. *Pinkney &c. Steamship Co.*, (1894) App. Ca. 222, an action at common law.) Beyond this, however, we find nothing in the English law to indicate that a ship or its owners are liable to an indemnity for injuries received by negligence or otherwise in the service of the ship. None such is given in the Admiralty Court Jurisdiction Act of 1861, although it seems an action in admiralty will lie against the master *in personam* for an assault committed upon a passenger or seaman. (*The Agincourt*, 1 Hagg. 271; *The Lowther Castle*, Ibid. 384.) This feature of the law we have ourselves adopted in general admiralty rule 16, declaring that "in all suits for assault or beating on the high seas, or elsewhere within the admiralty and maritime jurisdiction, the suit shall be *in personam* only." In England the master and crew are also treated as fellow servants, and hence it would follow that no action would lie by a member of the crew against either the owners or the ship for injuries received through the negligence of the master. (*Hedley* v. *Pinkney &c. Steamship Co.*, (1894) App. Ca. 222.) It is

otherwise, however, in Ireland, (*Ramsay* v. *Quinn*, Irish Rep. 8 C. L. 322,) and in Scotland, where the master is regarded as a vice principal. (*Leddy* v. *Gibson*, 11 Ct. Sess. Cases, 3d Ser. 304.)

The statutes of the United States contain no provision upon the subject of the liability of the ship or her owners for damages occasioned by the negligence of the captain to a member of the crew; but in all but a few of the more recent cases the analogies of the English and Continental codes have been followed, and the recovery limited to the wages and expenses of maintenance and cure. The earliest case upon the subject is that of *Harden* v. *Gordon*, (2 Mason, 541,) in which Mr. Justice Story held that a claim for the expenses of cure in case of sickness constituted in contemplation of law a part of the contract for wages, over which the admiralty had a rightful jurisdiction. The action was *in personam* against the master and owner for wages and other expenses occasioned by the sickness of the plaintiff in a foreign port in the course of the voyage, all of which were allowed. The question of indemnity did not arise in this case, but the court held that upon the authority of the Continental codes and by its intrinsic equity there was no doubt of the seaman's right to the expenses of his sickness.

This case was followed in *The Brig George*, (1 Sumner, 151,) and in *Reed* v. *Canfield*, (1 Sumner, 195.) Though the last case did not involve the question of indemnity, Mr. Justice Story, in delivering the opinion, remarked that "the sickness or other injury may occasion a temporary or permanent disability, but that is not a ground for indemnity from the owners. They are liable only for expenses necessarily incurred for the cure; and when the cure is completed, at least so far as the ordinary medical means extend, the owners are freed from all further liability. They are not in any just sense liable for consequential damages. The question, then, in all such cases is what expenses have virtually been incurred for the cure."

The question of indemnity, however, was fully considered by Judge Brown of the Southern District of New York in *The City of Alexandria*, (17 Fed. Rep. 390,) which was an action *in rem* for personal injuries received by the cook in falling through the fore hatch into the hold; and it was held that upon common law principles the claim could not be sustained, as the negligence through which the accident occurred was that of fellow servants engaged in a common employment. The court, however, went on to consider whether the negligence, upon the recognized principles of maritime law, entitled the libellant to compensation from the ship or her owners in cases not arising from unseaworthiness. After going ower the Continental codes, the cases above cited and a few others, Judge Brown came to the conclusion that he could find "no authority in the ancient or modern codes, in the recognized text-books or the decisions

on maritime law for the allowance of consequential damages resulting from wounds or hurts received on board ship, whether arising from ordinary negligence of the seaman himself or from others of the ship's company. Considering the frequency of such accidents and the lasting injuries arising from them in so many cases, the absence of any authority holding the vessel liable beyond what has been stated is evidence of the strongest character that no further liability under the maritime law exists."

The general rule that a seaman receiving injury in the performance of his duty is entitled to be treated and cured at the expense of the ship was enforced in *The Atlantic*, (Abbott's Adm. 451,) though it was said in this case and in *Nevitt* v. *Clark*, (Olcott, 316,) that the privilege of being cured continues no longer than the right to wages under the contract in the particular case. In *The Ben Flint*, (1 Abb. U. S. Reps. 126; *S. C.*, 1 Biss. 562,) the claim to be cured at the expense of the ship is held to be applicable to seamen employed on the lakes and navigable rivers within the United States. See also *Brown* v. *Overton*, (1 Sprague, 462;) *Croucher* v. *Oakman*, (3 Allen, 185;) *Brown* v. *The Bradish Johnson*, (1 Woods, 301.)

In *The Edith Golden*, (23 Fed. Rep. 43,) the vessel was held liable *in rem* for personal injuries received from the neglect of the owner to furnish appliances adequate to the place and occasion where used. In other words, for unseaworthiness. This is readily distinguishable from the previous case of *The City of Alexandria*, (17 Fed. Rep. 930,) and is in line with English and American authorities holding owners to be responsible to the seamen for the unseaworthiness of the ship and her appliances. In *The Titan*, (23 Fed. Rep, 413,) the ship was held liable to a deck hand, who was injured by a collision occasioned partly by fault of his own vessel. The question of general liability was not discussed but assumed. In the case of *The Noddleburn*, (28 Fed. Rep. 855,) the question of jurisdiction was not pressed by counsel, but merely stated and submitted. The case is put upon the ground that, as the accident was occasioned by the master knowingly allowing a rope to remain in an insecure condition, the vessel was consequently unseaworthy. In *Olson* v. *Flavel*, (34 Fed. Rep. 477,) libellant was allowed to recover damages for personal injury suffered by him while employed as mate, but if there were any negligence on the part of the respondent, it appears to have been not providing proper appliances, so that the case was one really of unseaworthiness. In the case of *The A. Heaton*, (43 Fed. Rep. 592,) a seaman was allowed to recover consequential damages for negligence of the owners in not providing suitable appliances, although in the opinion, which was delivered by Mr. Justice Gray, he seems to assume the right of the seaman to recover against the masters or owners for injuries caused by their willful

or negligent acts. The case however was one of injuries arising from unseaworthiness, although the learned judge in his discussion does not draw a distinction between the cases arising from the unseaworthiness of the ship and the negligent act of the master. It is interesting to note that in *The Julia Fowler*, (49 Fed. Rep. 277,) a seaman, employed in scraping the main mast on a triangle surrounding the mast, was allowed to recover for the breaking of the rope which held the triangle, and precipitated libellant to the deck; while in a case almost precisely similar, (*Kalleck* v. *Deering*, 161 Mass. 469,) the owners were held not to be liable for an injury caused by the negligence of the mate in constructing the triangle and ordering the seaman to use it. In *The Frank and Willie*, (45 Fed. Rep. 494,) the ship was held liable to a sailor who was injured by the negligence of the mate in not providing safe means for discharging the cargo. As the opinion was delivered by Judge Brown, who was also the author of the opinion in *The City of Alexandria*, (17 Fed. Rep. 390,) the case can be reconciled with that upon the ground that the question was really one of unseaworthiness and not of negligence.

Upon a full review, however, of English and American authorities upon these questions, we think the law may be considered as settled upon the following propositions:

1. That the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued.

2. That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship. (*Scarff* v. *Metcalf*, 107 N. Y. 211.)

3. That all the members of the crew, except perhaps the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of his maintenance and cure.

4. That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to maintenance and cure, whether the injuries were received by negligence or accident.

It will be observed in these cases that a departure has been made from the Continental codes in allowing an indemnity beyond the expense of maintenance and cure in cases arising from unseaworthiness. This departure originated in England in the Merchants' Shipping Act of 1876, above quoted, (*Couch* v. *Steel*, 3 El. & Bl. 402; *Hedley* v. *Pinkney*

&c. Co., 7 Asp. M. L. C. 135, (1894,) App. Cas. 222,) and in this country, in a general consensus of opinion among the Circuit and District Courts, that an exception should be made from the general principle before obtaining, in favor of seamen suffering injury through the unseaworthiness of the vessel. We are not disposed to disturb so wholesome a doctrine by any contrary decision of our own.

2. It is insisted, however, that a lien is given upon the vessel by a local statute of Wisconsin, (Rev. Stat. of 1898, sec. 3348,) repeating a previous statute upon the same subject, which provides that every ship, boat or vessel used in navigating the waters of that State shall be liable "for all damages arising from injuries done to persons or property by such ship, boat or vessel," and that the claim for such damages shall constitute a lien upon such ship, boat or vessel, which shall take precedence of all other claims or liens thereon. As the accident happened within three miles of the port of Milwaukee, and as the constitution of Wisconsin fixes the center of Lake Michigan as the eastern boundary of the State, there is no doubt that the vessel was navigating the waters of that State at the time of the accident. But the vital question in the case is whether the damages arose from an injury done to persons or property *by such ship*, boat or vessel. The statute was doubtless primarily intended to cover cases of collision with other vessels or with structures affixed to the land, and to other cases where the damage is done by the ship herself, as the offending thing, to persons or property outside of the ship, through the negligence or mismanagement of the ship by the officers or seamen in charge. To hold that it applies to injuries suffered by a member of the crew on board the ship is to give the act an effect beyond the ordinary meaning of the words used. Would it apply, for instance, to injuries received in falling through an open hatchway? Or to a block blown against a seaman by the force of the wind, though the accident in either case might have resulted from the negligence of the master? We think not.

The act in this particular uses the same language as the seventh section of the English Admiralty Court Act of 1861, which declares that "the High Court of Admiralty shall have jurisdiction over any claim for damage done by any ship." Construing that act, it has been held by the Court of Admiralty that it applies to damages occasioned by a vessel coming in collision with a pier, (*The Uhla*, L. R. 2 Ad. & Ec. 29, note,) and also to cases of personal injury: *The Sylph*, Ibid. 24, where a diver, while engaged in diving in the river Mersey, was caught by the paddle wheel of a steamer and suffered considerable injury; but not to a case where personal injuries were sustained by a seaman falling down into the hold of a vessel, owing to the hatchway being insufficiently protected, (*The Theta*, 1894, P. D. 280,) or to loss of life, (*The Vera Cruz*, 9 P. D.

96.) As we have indicated above the statute was confined to cases of damage done by those in charge of a ship with the ship as the "noxious" instrument," and that cases of damages done *on board* the ship were not within the meaning of the act of damages done *by the ship*.

In the case under consideration the damage was not done by the ship in the ordinary sense of the word, but by a gangway, which may be assumed to be an ordinary appliance of the ship, being blown against the libellant by the force of the wind.

It results that the first and third questions must be answered in the negative.

True copy.

Test:

Clerk Supreme Court, U. S.